

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF JOSEPH
C. MURRAY, dba MURRAY
CONSTRUCTION ENTERPRISES

Appellants,

v.

PUGET SOUND AIR POLLUTION
CONTROL AGENCY,

Respondent.

PCHB Nos. 86-124, 86-125
and 86-126

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
ORDER

This matter, three appeals of three notices and orders of civil penalties totaling \$3,000 for outdoor burning allegedly in violation of Sections 8.05. 9.03(b) and 9.11(a) of respondent's Regulation I came on for hearing before the Board; Lawrence J. Faulk, Chairman and presiding, Wick Dufford, and Judith A. Bendor at Lacey on November 21, 1986. Respondent agency elected a formal hearing in accordance with WAC 371-08-155. Lisa Flechtner of Barker and Associates officially reported the proceeding.

1 Appellant Murray Construction Enterprises, appeared and was
2 represented by Gary W. East, Attorney at Law. Respondent public
3 agency Puget Sound Air Pollution Control Agency appeared and was
4 represented by its attorney Keith D. McGoffin.

5 Witnesses were sworn and testified. Exhibits were admitted and
6 examined. Argument was heard.

7 From the testimony, evidence, and contentions of the parties the
8 Board makes these

9 FINDINGS OF FACT

10 I

11 The Puget Sound Air Pollution Control Agency (PSAPCA) is an
12 activated air pollution control authority under terms of the state's
13 Clean Air Act, empowered to monitor and enforce outdoor open burning
codes in a five-county area of mid-Puget Sound.

15 The agency has filed with the Board a certified copy of its
16 Regulation I, and all amendments thereto, of which we take judicial
17 notice.

18 II

19 Joseph C. Murray, is a building contractor located in Lynnwood,
20 Washington, doing business as Murray Construction Enterprises.

21 III

22 On February 12, 1986, at approximately 3:30 p.m., a PSAPCA
23 inspector, responding to a citizen's complaint, arrived at the scene
24 of an outdoor fire in the vicinity of 18905-24th Avenue West in
25 Lynnwood, Washington. The inspector observed a fire of natural
26 vegetation approximately 60 feet by 10 feet by 5 feet. The inspector

FINAL FINDINGS OF FACT AND
CONCLUSIONS OF LAW AND ORDER

PCHB Nos. 86-124, 86-125 & 86-126 2

1 stood approximately 80 feet southwesterly of the fire, the sun at his
2 back, with the smoke blowing in an easterly direction approximately
3 perpendicular to his line of site. He observed the fire for 10
4 minutes and recorded a continuous 100% opacity for the entire period.

5 The inspector contacted a Mr. C.P. Camby who was on the site
6 tending the fire. Mr. Camby indicated that Mr. Murray, the appellant,
7 owned the property and that tree trimmings were being hauled in to be
8 burned. Mr. Camby was an employee of Mr. Murray. The inspector
9 explained to Mr. Camby that notices of violation would be issued by
10 PSAPCA.

11 IV

12 Mr. Camby was able to produce a Population Density Verification
13 (PDV) from PSAPCA relative to the burning site, issued on October 2,
14 1985, and effective for a year from the date of issuance. The PDV
15 verified that the site is in an area where the population is not as
16 dense as 2,500 persons per square mile. The document set forth a
17 number of restrictions applicable to land clearing burning, in
18 particular that odor, smoke, and fly ash must not be emitted in such a
19 fashion as to interfere unreasonably with others' enjoyment of life
20 and property. It also warned that burning materials, other than
21 trees, stumps, shrubbery or other natural vegetation which grew on the
22 property being cleared, was prohibited.

23 V

24 On February 13, 1986, three notices of violation were mailed to
25 the appellant. On February 20, 1986, the inspector received a

26 FINAL FINDINGS OF FACT AND
CONCLUSIONS OF LAW AND ORDER

PCHB Nos. 86-124, 86-125 & 86-126 3

complaint dated February 12, 1986, about burning at the site from five residents who live near-by. The chief complainant lives at 18819-24th Ave. West, Lynnwood - directly adjacent to the site of the property.

IV

On June 19, 1986, notice and order of civil penalty No. 6457 for \$1,000 was issued to appellant for allegedly violating Sections 9.03(b) and 8.05 of Regulation I. Feeling aggrieved by this action, appellant appealed to this Board on July 17, 1986, and the appeal became our number PCHB No. 86-124.

VII

On April 28, 1986 at approximately 1:30 p.m., a PSAPCA inspector, responding to the same citizen's second complaint, arrived in the vicinity of 18905-24th Avenue West. The complainant stated that smoke from the land clearing fire being conducted on Murray's property was adversely affecting her. The inspector observed that the wind was blowing from a southerly to southwesterly direction at 10 to 15 m.p.h. The inspector further observed that the landclearing fire was located approximately 50 yards south of the complainant's residence. The inspector took three pictures of the outdoor fire. The resulting smoke produced was dense.

The inspector saw a pile burning which appellant earlier had admitted to him contained material hauled in from other locations. The inspector contacted the appellant and indicated that two notices of violation would be issued for allegedly burning hauled-in natural vegetation, and for smoke emissions which allegedly interfered with enjoyment of life and property of the complainant.

VIII

On May 7, 1986, two notices of violation were issued to the appellant Mr. Murray by respondent PSAPCA.

IX

On June 19, 1986, Notice and Order of Civil Penalty No. 6458 for \$1,000 was issued to appellant for allegedly violating Sections 8.05 and 9.11(a) of Regulation I. Feeling aggrieved by this action, appellant appealed to this Board on July 18, 1986, and the appeal became our number PCHB No. 86-125.

X

On May 8, 1986, at approximately 9:15 a.m., a PSAPCA inspector, again responding to a citizen's complaint, arrived in the vicinity of 18905-24th Avenue West. The inspector observed two outdoor fires, 10 feet by 10 feet, containing limbs and boughs, on appellant's property. The inspector took two photographs of the fires.

The inspector contacted the appellant, who indicated that the branches were hauled in from another location to assist in the burning of the remaining stumps. The inspector indicated to Mr. Murray that he was in violation of Regulation I. As a result, a notice of violation was issued that day.

XI

On June 19, 1986, Notice and Order of Civil Penalty No. 6460 for \$1,000 was issued to appellant for allegedly violating section 8.05 of Regulation I. Feeling aggrieved by this action, appellant appealed to this Board on July 17, 1986, and the appeal became our number PCHB No. 86-126.

XII

Murray Construction Enterprises routinely engages in land clearing projects and has been doing so for over 10 years. It should be well advised of PSAPCA's regulations.

XIII

After appealing, Mr. Murray denied that he had burned material hauled into the site on April 28 and May 8, 1986. His testimony on this point is at variance with his admissions made contemporaneously with the events, as related in the PSAPCA inspector's testimony. His denial was likewise contradicted by the eye-witness testimony of the complaining neighbor.

Murray's employee Camby admitted that hauled-in material was burned on the site on February 12, 1986, but denied this was the case on April 28 and May 8. He stated that he was on-site almost continuously from February 12 through May 8, 1986. He described the amount of hauled-in material burned on February 12 as small, minor and insignificant, but indicated that it comprised 15-20% of the material burned.

XIV

Evaluating all the evidence before us, we are ultimately persuaded by the version of events presented by the agency. We find that hauled-in materials were burned in the fires on all three dates in question.

XVI

Any Conclusion of Law which is deemed a Finding of Fact is hereby adopted as such.

From these Findings the Board comes to these

CONCLUSIONS OF LAW

I

The Board has jurisdiction over these persons and these matters.
Chapters 70.94 and 43.21B RCW.

II

The Legislature of the State of Washington has enacted the
following policy on outdoor fire:

It is the policy of the state to achieve and maintain high
levels of air quality and to this end to minimize to the
greatest extent reasonably possible the burning of outdoor
fires. Consistent with this policy, the legislature declares
that such fires should be allowed only a limited basis under
strict regulation and close control. RCW 70.94.740.

III

The means for implementing the policy of RCW 70.94.470 is outlined
in succeeding sections of the statute. RCW 70.94.755 calls for the
creation of a "program" to carry out the limited burning policy
through the adoption of regulations. Subject to the provisions of
such a program, RCW 70.94.750 (2) allows:

...fires consisting of residue of a natural character such as
trees, stumps, shrubbery or other natural vegetation arising from
land clearing projects or agricultural pursuits for pest of
disease control; provided the fires described in this subsection
may be prohibited in those areas having a general population
density of one thousand or more persons per square mile.

IV

The open burning program of PSAPCA allows land clearing burning in areas where the average population density on land within 0.6 miles of the proposed burning site is 2,500 persons per square mile or less. PSAPCA Regulation I, Section 8.06(3). The PDV issued by the agency verified that the population around the site here was sufficiently sparse for such burning to occur.

However, the PSAPCA program defines "land clearing burning" narrowly, limiting it to natural vegetation arising from land clearing projects and "burned on the lands on which the material originated." Regulation I, Section 1.07(y)

V

Regulation I, Section 8.05 makes it unlawful for any person to cause or allow any outdoor fire other than land clearing burning or residential burning without prior written approval of PSAPCA.

This section was violated on February 12, April 28 and May 8, 1986, when hauled-in material was burned on Mr. Murray's property. Because such material was used, the burning did not meet the definition of "land clearing burning." It, therefore, required specific prior written approval. No such approval was obtained in any instance in question.

VI

The Population Density Verification is not a written approval satisfying the requirements of Section 8.05. It is merely a verification that a certain site is in an area where "land clearing burning" may be conducted without a permit. It does not purport to

1 authorize any other kind of burning.

2 VII

3 Appellant argues that burning small amounts of off-site material
4 in land clearing operations is consistent with the enabling
5 legislation and that the PSAPCA's limitation to burning on land where
6 the material originated goes beyond the provisions of the legislation.

7 We disagree. The policy of RCW 70.94.740 calls for minimizing
8 outdoor fires" to the greatest extent reasonably possible." Land
9 clearing burning is allowed at all only subject to a program to carry
10 out that policy. For such a program, in effect, to preclude the
11 creation of burning dumps where materials are hauled in for disposal
12 by outdoor fires appears wholly consistent with the legislative scheme.

13 Moreover, we perceive no legal problem with making the prohibition
14 of off-site material absolute. Nothing prevents the program of
15 limited open burning from containing stringent restrictions as to the
16 origin of the materials burned.

17 VIII

18 Regulation I, Section 9.03(b) makes it unlawful for any person to
19 cause or allow the emission of any air contaminant for a period of
20 more than three minutes in any one hour greater than 20% opacity. We
21 hold that this provision was shown to be violated on February 12, 1986.

22 IX

23 Appellant argues that the opacity standard should not be applied
24 because Section 8.10 exempts outdoor fires complying with Article 8
25 from meeting the opacity limit. The problems however, is that the
26 burning on February 12 did not comply with Article 8. Because Section

8.05 was violated, the provisions of Section 9.03(6) may also be applied.

X

Section 9.11(a) makes it unlawful for any person to cause or permit the emission of an air contaminant in sufficient quantities and of such characteristics and duration as is, or is likely to be, injurious to human health, plant or animal life or property, or which unreasonably interferes with enjoyment of life and property.

This language parallels the statutory definition of "Air Pollution" RCW 70.94.030(2) and is, in effect, a restatement of the Clean Air Act's prohibition of acts which cause or permit "Air Pollution". RCW 70.94.040.

Because of the decision we reach on violations of Section 8.05 and penalties in connection therewith, we need not consider whether Section 9.11(a) was violated on April 28, 1986, and decline to do so.

XI

The purpose of the civil penalty is not retribution, but rather to influence the behavior of the perpetrator and to deter violations generally. Determining the proper amount in any case involves consideration of factors bearing on reasonableness in light of the penalty's purpose. These factors include:

- a.) The nature of the violation;
- b.) The prior behavior of the violator;
- c.) Actions taken after the violation to solve the problem.

Puget Chemco v. PSAPCA, PCHB No. 84-245(1985).

XII

Here \$1,000 was assessed for each incident. The proof as to the February 12 event sustained two independent violations: improperly burning material from off-site and generating smoke exceeding opacity limits. Considering all the facts and circumstances, we do not regard \$1,000 as an excessive penalty in the aggregate for these two offenses.

This appellant is in a business which routinely involves land clearing burning and has been in the business for some time. His possession of a valid PDV indicates an awareness of the laws and the document on its face provides notice of the law's restrictions. Under these conditions, we do not think \$600 for burning off-site material alone would be an unreasonable penalty, and in this light, the subsequent penalties for substantially the same behavior -- burning hauled-in-material -- represent an appropriate escalation of sanction.

In our view of the case, the problem was not solved after the first incident forceably brought the agency's restrictions to appellant's attention. We believe the penalties imposed must be upheld in the interests of the deterrence purposes of the law.

XIV

Any Finding of Fact herinafter determined to be a Conclusion of Law is hereby adopted as such.

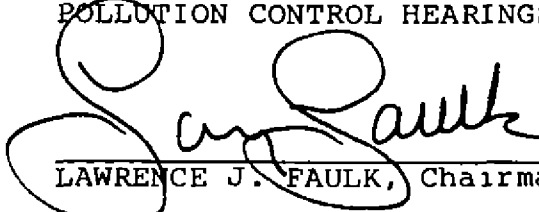
From these conclusions, the Board makes this

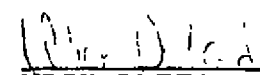
ORDER

Notice and Order of Civil Penalties Nos. 6457, 6458 and 6460 are affirmed.

DONE this 31st day of December 1986.

POLLUTION CONTROL HEARINGS BOARD

 12/31/86
LAWRENCE J. FAULK, Chairman


WICK DUFFORD, Member


JUDITH A. BENDOR, Member

FINAL FINDINGS OF FACT AND
CONCLUSIONS OF LAW AND ORDER
PCHB Nos. 86-124, 86-125 & 86-126 12